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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 137

NEW CUT RATE LIQUORS, INC., *et al.*,
Petitioners,

vs.

SEAGRAM DISTILLERS CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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NO.

NEW CUT RATE LIQUORS, INC., *et al.*,

Petitioners,

vs.

SEAGRAM DISTILLERS CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, fifty-two retail liquor vendors named in the margin[1], seek this Court's writ of *certiorari* to review the decision of the Court of Appeals for the Seventh Circuit in this case.

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[1] New Cut Rate Liquors Inc.; B & B Liquors, Inc.; Albert Vaitaitis; Harry Silverman; Jack Lavine and Robert Lavine; David Feltzer; Sam Malkin and Maurice Robin; Henry Newman and Rebecca Newman; James L. Horan; Milton M. Chemers; Nick Pintozzi; Thomas Pape; Frank Pintozzi; Ed's Liquors, Inc.; Diversey Liquors Corporation; Friendly Liquor Mart, Inc.; Oc-

CITATIONS TO OPINION BELOW

The opinion of the Court of Appeals in this case is not yet officially reported. It is reprinted in full as Appendix I to this Petition. The District Court rendered no written opinion.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The Date Of The Judgment Sought To Be Reviewed And Of The Order Denying Rehearing.

The opinion of the Court of Appeals was filed and its judgment was rendered on April 4, 1955. Petitioners' petition for rehearing was denied on April 25, 1955.

The Statutory Provision Conferring Upon This Court Jurisdiction To Review This Judgment.

This Court's jurisdiction is invoked under Section 1254 (1) of the United States Judicial Code (U.S.C.A., Title

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tavio Narcisi, Nick Brunetti and Feliz Giannattasio; Glenn Liquor Co. Inc; Binstein, Inc.; Lena Paterno; Jesse Bergandi and Frank Bergandi; Martin R. O'Connor and Martin F. Conroy; Healie Schwartz and Louis Schwartz; Jack Lavine and Myer L. Fellars; Bill and Rose Ridell; Westown Liquors, Inc.; 26th and Kedzie Liquor Co. Inc.; Ontario Pharmacy, Inc.; Leon H. Phillips; McCoy Liquor Stores, Inc.; The Real McCoy, Inc.; Roosevelt Wines & Liquors, Inc.; Morris Rubin; Jack Segal; Stanley Lutz; Soifer & Sons, Inc.; Sun Pay Less Drugs, Inc.; Sun Cut Rate Drugs, Inc.; Sun Self-Serv, Drugs Inc.; Leonard L. Freeman; Betty Malkin; James Castaldo; The Malkin Company, Inc.; Harry Schwarzbach; Lawrence & Western Wines & Liquors, Inc.; Foremost Promotions, Inc.; Sam Rosen; Jack Kanarish; Jack W. Kerschner; Sylvia Leonard and Leonore Robins.

28, Sec. 1254 (1)), which confers upon this Court jurisdiction to review decisions of the United States Courts of Appeals in, *inter alia*, appeals from temporary restraining orders and under Section 1651 of the United States Judicial Code (U.S.C.A., Title 28, Sec. 1651), which is the source of this Court's general jurisdiction to issue writs, including its writ of *certiorari*, in the exercise of its superintendence of lower Federal courts.

THE QUESTIONS PRESENTED FOR REVIEW.

The questions presented are:

1. SHOULD THE DISTRICT COURT OR THE COURT OF APPEALS HAVE REMITTED THE PARTIES TO THE STATE COURTS UNDER THE DOCTRINE OF **CHICAGO v. FIELDCREST DAIRIES, INC.**, 316 U. S. 168, IN VIEW OF THE PRESENCE OF THE STATE CONSTITUTIONAL QUESTION, AS TO WHICH THERE IS A DIRECT CONFLICT IN THE DECISIONS OF OTHER STATES, WHETHER A STATE FAIR TRADE ACT INVALID AT THE TIME OF ITS AMENDMENT BECAUSE OF ITS REPUGNANCE TO THE SHERMAN ACT CAN BE VITALIZED BY THE SUBSEQUENT ENACTMENT OF THE MILLER TYDINGS AMENDMENT AND THE McGUIRE ACT AND IN VIEW OF AN IMPORTANT QUESTION OF THE CONSTRUCTION OF THE ILLINOIS ACT IF THE ILLINOIS ACT IS VALID?

2. DOES THE DISTRICT COURT'S PRELIMINARY INJUNCTION, WHICH RESTRAINS PETITIONERS FROM SELLING LIQUORS UNDER BRAND NAMES AT PRICES LESS THAN THOSE FIXED OR HEREAFTER TO BE FIXED BY FAIR TRADE CONTRACTS BUT DOES NOT SET FORTH SUCH PRICES, VIOLATE THE REQUIREMENT OF RULE 65 (d) OF THE FEDERAL RULES OF CIVIL PROCEDURE THAT INJUNCTIONS SHALL "BE SPECIFIC IN TERMS" AND "SHALL DESCRIBE IN REASONABLE DETAIL, AND NOT BY REFERENCE TO THE COMPLAINT OR OTHER DOCUMENT, THE ACT OR ACTS SOU , IT TO BE RESTRAINED"?

This precise question, *i.e.*, the question whether a Federal Fair Trade injunction must or need not embody within its text the minimum prices sought to be maintained, was answered in the negative in the instant case and in the affirmative eighteen days later by the Court of Appeals for the Fifth Circuit, in *Schwegmann Bros. Giant Super Markets* v. *Hoffman-LaRoche, Inc. Opinion reported in full, Appendix* 5, *post.*

3. DID THE RESPONDENT ESTABLISH THE PRESENCE OF THE REQUISITE JURISDICTIONAL AMOUNT BY A SHOWING OF LARGE INVESTMENT IN GOOD WILL AND OPINION EVIDENCE THAT RESPONDENT WOULD LOSE ITS MARKET WITH MANY RETAILERS IF "FAIR TRADE" PRICES WERE NOT MAINTAINED BUT WITH NO SHOWING THAT PETITIONER WOULD NOT GAIN A COMPARABLE OR GREATER MARKET AMONG OTHER DISTRIBUTORS IF THE LATTER WERE PERMITTED TO SELL AT RETAIL PRICES LOWER THAN THOSE FIXED UNDER THE FAIR TRADE ACT?

THE STATE STATUTORY PROVISIONS INVOLVED.

ILLINOIS FAIR TRADE ACT.

(Ill. Rev. Stats. 1953, Ch. 121½, pars. 188-191 Incl., Vol. II, pp. 1070-1071.)

(Senate Bill 598, Laws of 1935, amended by House Bill 230, filed without approval June 25, 1941.)

An Act to protect trade mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a trade mark, brand or name.

Sec. 1. [Certain sale contracts declared lawful.—] No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand or name of the producer or owner of such commodity and which is in fair and open competition

with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract:

(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity: provided, however, that such stock is first offered to the manufacturer of such stock at the original invoice stock price, at least ten (10) days before such stock shall be offered for sale to the public.

(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(3) By any officer acting under the orders of any court.

Sec. 2. [Sales below contract price.—] Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Sec. 3. [Exceptions.—] This Act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

The provision of this Act shall not apply to any contract or agreement relating to any commodity for library purposes which may be sold or offered for sale to the State of Illinois or to any of its administrative agencies or political subdivisions, or to any municipality, or to any free public library, endowed library, college, university or school library in this State. [As amended June 25, 1941.]

Sec. 4. [Short title].— This Act may be known and cited as the "Fair Trade Act."

STATEMENT OF THE CASE.

Respondent, which is a packaged liquor dealer intermediary between the producer of trade-marked brands and distributors but does not itself own any trade-marks or sell directly to any retailers, brought this suit against petitioners, fifty-two retail vendors of packaged liquors, to restrain petitioners "from advertising, offering for sale or selling Seagram products or any of them, at less than the prices stipulated from time to time in accordance with the Fair Trade contracts entered into by Seagram-Distillers corporation in the State of Illinois." (*Prayer of Amended Complaint*, Tr. 18.)

Jurisdiction is asserted upon admitted diversity of citizenship and disputed assertion that more than $3,000 is involved. (*Allegation of jurisdictional amount*, Tr. 15, *Denial*, Tr. 9.)

Petitioners interposed two defenses that give incidence to one of the three questions that petitioners deem to be of sufficient import to evoke this Court's discretionary review, namely, the question whether this case presents questions of Illinois constitutional and statutory law of such great importance throughout the State that the lower courts should have and since they did not, this Court should *sua sponte* remit the parties to the State courts for resolution of these questions.

One of these defenses is that the Illinois Fair Trade Act (Ill. Rev. Stat. 1953, Chap. 121½, Pars. 188-191, pp. 1070-1071) was enacted in 1935, at which time it was unconstitutional because it was repugnant to the Sherman Anti-Trust Act (15 U.S.C.A., Sec. 1) and that, being thus

stillborn, it could not be vitalized by the Miller-Tydings Amendment (15 U.S.C.A., Sec. 1) or the McGuire Act (15 U.S.C.A. Sec. 45).

There is a direct conflict of authority on the precise questions whether (1) the Miller-Tydings Amendment (U.S.C.A. Title 15, Sec. 1) and the McGuire Act (U.S.C.A., Title 15, Sec. 45) could validate State Fair Trade Acts repugnant to the Sherman Act at the time of their enactment and (2) as to whether the presence of this question in a Fair Trades injunction suit tendered to a Federal Court upon grounds of diversity of citizenship should remit the parties to the State Courts.

New York and New Jersey have held that the Miller-Tydings Amendment and the McGuire Act validated antecedent State Fair Trade laws. *General Electric Company* v. *Masters, Inc.*, 307 N.Y. 229, 120 N.E. 2d 802. *Lionel Corp.* v. *Grayson-Robinson Stores*, 15 N.J. 191, 104 Atl. 2d 304.

Georgia has declared exactly the contrary. Georgia's Supreme Court has held that Georgia's Fair Trade Act was not validated by the Miller-Tydings Amendment or the McGuire Act. *Grayson-Robinson Stores* v. *Oneida, Ltd.*, 209 Ga. 613, 75 S.E. 2d 161.

The District Court for the Northern District of Arkansas, per Lemley, J., has held in a case identical with the instant case, *Union Carbide & Carbon Corp.* v. *White River Distributors, Inc.* ..... F. Supp. ....., not yet reported in the Federal Supplement, that the question whether the Arkansas Fair Trade Act, unconstitutional at the time of its enactment, was vitalized by the Miller-Tydings Amendment and the McGuire Act should remit the parties to the State court. The District Court for the Eastern District of Tennessee, Taylor, J., *Sterling Drug, Inc.* v.

Anderson, consolidated opinion, 127 F. Supp. 511, has likewise held that the questions whether the Tennessee Act was validated by the *Federal* statute should remit the parties to the State Court.

"Whether an Act of Congress can validate State statutes which were previously invalid because inconsistent with Federal legislation has not been uniformly decided." 11 Am. Jr. (Constitutional Law) 833, Sec. 151.

It is petitioners' contention, vindicated, we believe, in the Reasons Relied On for Granting of The Writ, *post*, that the District Court or the Court of Appeals should have and since those courts did not, this Court should *sua sponte* remit the parties to the State courts for the resolution of this important and fairly debatable question of State constitutional law under the doctrine of *Chicago* v. *Fieldcrest Dairies*, 316 U.S. 168, which case recognizes that the point may be raised for the first time in this Court.

Petitioners also contended that under a correct construction of the Illinois Fair Trade Act, since the only parties to respondent's Fair Trade contract were respondent, which was neither a producer of trade-marked goods nor an owner of any trade-marks, and distributors, none of whom were retailers, respondent's Fair Trade contracts were not within the purview of and were not not validated by the Illinois Fair Trade Act even if that Act is constitutional. Petitioners do not ask this Court to resolve that question. Rather they ask it to hold, even though concededly the point has not been heretofore made by petitioners, that the lower courts should not have entertained upon grounds of diversity of citizenship alone cases requiring the decision of questions of State statutory construction of far-reaching consequence in the State and National economy.

In addition to the defenses grounded upon petitioners' conception of Illinois constitutional and statutory law, a third defense raises a question which petitioners believe to be of sufficient importance to evoke *certiorari*.

Respondent offered evidence that it had expended in excess of three million dollars for advertising and promotion (Tr. 86) and that in the opinion of a witness who had for some fifteen years been attorney for respondent, respondent's Fair Trade system "would break down entirely" and "would cut their volume at least 50% in three months' time". (Tr. 86.) *Respondent offered no evidence that for every retailer who withdrew his patronage of respondent because of "price cutting", another retailer or retailers would not purchase a comparable or greater amount of wears if such retailers were allowed to sell them at retail in a free competitive market.*

In the light of the authorities marshalled under the Reasons For Granting The Writ, *post*, this case propounds the important question whether jurisdictional amount in suits to enjoin alleged violations of Fair Trade Acts may be established by proof of loss of retail customers who desire the protection of Fair Trade price-fixing without showing that there will be no corresponding gain of retail customers who desire to sell at what plaintiffs always call "cut rate" prices.

Upon the hearing of respondent's application for preliminary injunction, the trial court resolved, at least provisionally, all of the issues of fact and law in favor of respondent and granted an interlocutory order, including findings of fact and conclusions of law (Tr. 30-55).

The language of the injunction, important because of petitioners' contention that such language violates provisions of Rule 65 (d) of the Federal Rules of Civil Procedure

that the terms of an injunction shall "be specific in terms" and "shall describe in reasonable detail, and *not by reference to the complaint or other document, the act or acts sought to be restrained,*" is that the petitioners

> "be, and they are hereby jointly and severally enjoined and restrained from wilfully and knowingly advertising, offering for sale or selling Seagram products, including but not limited to Seagram's V.O., Seagram's Seven Crown Blended Whiskey and Seagram's Ancient Bottle Gin, in Illinois, at less than the prices stipulated by Seagram-Distillers Corporation from time to time under the Illinois Fair Trade Act and in accordance with contracts made pursuant to said Act, *which contracts at the time of the filing of the complaint herein were, now are or may hereafter be in force in Illinois* relating to the sale or resale of any of said Seagram products in that state." (Tr. 35.)

In the Reasons Relied on For The Granting Of The Writ, *post,* we demonstrate that the Court of Appeals' tacit approval of the language above quoted, which requires recourse to Fair Trade contracts *dehors* the text of the injunction, is in direct conflict with the holding of the Court of Appeals for the Fifth Circuit in *Schwegmann Brothers Giant Super Market* v. *Hoffman-La Roche, Inc.,* ..... F. 2d ....., not yet officially reported, Appendix V, *post,* p. 39, rendered April 22, 1955, eighteen days after the pronouncement of the opinion in this case, that a restraining order in a Fair Trade injunction case is *void* and disobedience thereof is not a contempt where the prices sought to be maintained by the injunction are not set forth within the four corners of the order.

REASONS RELIED ON FOR THE GRANTING OF THE WRIT.

I.

The District Court or the Court of Appeals should sua sponte have remitted Respondent to the State Courts for the resolution of the important State Constitutional and statutory questions tendered by this case. The point is one that may be raised for the first time on application for certiorari.

In *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496, this Court announced the doctrine, more fully expounded and expanded in *Chicago* v. *Fieldcrest Dairies*, 316 U.S. 168, that even where jurisdiction on the grounds of diversity of citizenship and presence of the jurisdictional requisite amount is present, lower courts should and when they do not, this Court will *sua sponte* remit the parties to the State courts where it appears that the suit tenders substantial questions of far reaching importance as to the construction of a State Statute or of the validity thereof under State constitutional principles.

In the *Fieldcrest Dairies* case, respondent, a Michigan corporation selling milk in Chicago, assailed an ordinance the intent of which was to interdict the retail sale of milk in waxed paper containers instead of glass bottles. The ordinance was attacked on the ground that (1) it was insubordinate to State legislation, which, it was claimed, had stripped cities of the power to regulate the type of containers in which milk could be sold to consumers, (2) it was insubordinate in various respects to the Constitution of the State of Illinois and (3) it denied Fieldcrest due

process under the Fourteenth Amendment and unconstitutionally interfered with interstate commerce.

Both the District Court and the Court of Appeals entertained and decided the case upon its substantive merits. No party to that case suggested in the District Court or the Court of Appeals, nor did any judge of either of those courts suggest that the District Court should have remitted the parties to State tribunals for the adjudication of these substantial questions of State constitutional and statutory construction.

This Court said at page 171:

> "We granted the petition for certiorari because of the doubtful propriety of the District Court and of the Circuit Court of Appeals undertaking to decide such an important question of Illinois law instead of remitting the parties to the state courts for litigation of the state questions involved in the case. *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496."

This Court held that both the District Court and the Court of Appeals abused their discretion in entertaining the cause upon the merits. The Court said at page 172:

> "It is an exercise of a 'sound discretion which guides the determination of courts of equity.' *Beal* v. *Missouri Pacific R. Co., supra*, p. 50. In this case, that discretion calls for a remission of the parties to the state courts, which alone can give a definite answer to the major questions posed. Plainly, they constitute the more appropriate forum for the trial of those issues."

Similarly, in *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496, this Court held that even where Federal jurisdiction existed, a Federal court should not entertain an attack upon an order of the Texas Railroad Commission which depended for its validity, *first*, upon a construction of the Texas statute relied upon as authorizing promulgation of the order, *second*, upon a construction of the Texas

constitution and only if those two questions of State law should be resolved adversely to the Pullman Company upon the Federal constitutional principles invoked.

In the instant case, there exist two very substantial questions, one of State constitutional law and the other of State statutory construction.

The question whether State Fair Trade acts invalid at the time of their enactment, at least as to interstate commerce, can be vitalized by the subsequent enactment of the Miller-Tydings Amendment and the McGuire Act has given genesis to a direct conflict of authority in other States. New York has answered the question in favor of the validation of such acts. *General Electric* v. *Masters, Inc.*, 307 N.Y. 229, 120 N.E. 2d 802. New Jersey has reached the same conclusion. *Lionel Corp.* v. *Grayson-Robinson Stores*, 15 N.J. 191, 104 Atl. 2d. 304. Georgia has reached a diametrically opposite conclusion and has declared that the Georgia Fair Trade Act invalid at the time of its enactment is not validated by the Federal legislation above mentioned. *Grayson-Robinson Stores* v. *Oneida, Ltd.*, 209 Ga. 613, 75 S.E. 2d. 161.

In *Union Carbide & Carbon Corp.* v. *White River Distributors, Inc.*, ... F. Supp. ....., not yet reported in the Federal Supplement, the District Court said:

> "It must be recognized, however, that the final decision of the questions now under consideration does not rest with us or with any other federal court; said questions are of state constitutional law, and the last word as to them must come from the Supreme Court of Arkansas. Regardless of how we might decide these questions, our decision would be but a forecast of how, to our mind, the Supreme Court of Arkansas would decide them, which forecast could be immediately overturned by an authoritative decision of that court. Such federal forecasts of state law are undesirable, particularly in equitable actions, such as this, wherein the granting or withholding of relief rests, at least in

some measure, within the discretion of the court, and wherein there is more flexibility in the moulding of remedies than is found in actions sounding purely in law. *Railroad Comm. of Texas* v. *Pullman Co.*, 312 U.S. 496; *cf. Harlow* v. *Ryland*, 8 Cir., 172 F. 2d 784."

The Court observed further:

"If we were compelled at this time to decide these questions, we would probably be constrained to agree with the defendant with respect to both of them."

Thus the Arkansas District Court intimated, although it forbore declaration, that it agreed with the decision of the Supreme Court of Georgia in *Grayson-Robinson Stores* v. *Oneida, Ltd.*, 209 Ga. 613, 75 S. E. 2d 161; that Fair Trade Acts repugnant to the Sherman at the time of their enactment cannot be validated by Federal laws subsequent thereto.

Of course the question as to whether a State statute is or is not effectively enacted is a question of State, not of Federal, constitutional law.

Hence this case tenders a substantial question of State constitutional law of far reaching importance in the State and National economy.

The question of State statutory construction arises from the following considerations:

Section 1 of the Act provides in pertinent part as follows:

"No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in viola-

tion of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract:

"(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

"(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee."

(Ill. Rev. Stat. 1953, Chap. 121½, Par. 188, p. 1070.)

Now the specimen of Fair Trade contract involved in this case purports to be a contract between respondent, a sales agency selling at wholesale to *distributors*, and a *retailer, to whom respondent does not sell at all*, but who may in the future purchase from an intermediary distributor.

As between petitioner and retailer, there is neither buyer nor seller; for petitioner sells nothing to retailer and retailer purchases nothing from petitioner.

This is made clear by the testimony of respondent's witness William R. Teece (Tr. 87):

"Q. Mr. Witness, you don't sell direct to the retailer, do you?

"A. No, sir.

"Q. You are in the nature of a distributor, aren't you? You are not a producer, are you?

"A. No, we are not. We are a sales organization."

Petitioners contend that Fair Trade contracts of the type relied upon by respondent are *not* contracts between the owner of a brand, for respondent does not claim to own the trade marks, and the retail purchasers whose minimum prices are intended to be fixed by the contract, for the retailers purchase nothing whatever from respondent.

The question whether these contracts (if they exist at all, and not a single contract was introduced in evidence) comply with the Illinois Fair Trade law is a substantial question of State law. It is of far-reaching importance. It effects the entire price structure of all industries in Illinois whose brand names are sought to be protected by Illinois Fair Trade contracts.

Under the teachings of this Court in the *Fieldcrest* and *Pullman Company* cases, cited above, the District Court or the Court of Appeals should have and since they did not, this Court should *sua sponte* remit the parties to the State courts.

Respondent, although presumably aware of this diametrical conflict in the constitutional jurisprudence of other states as to whether Fair Trade Acts invalid at the time of their enactment because in conflict with the Sherman Act are or are not validated without reenactment by the Miller-Tydings Act, chose to repair to a Federal court, which could not possibly answer this question authoritatively, instead of recurring to the courts of Illinois, who could so answer it.

Under *Fieldcrest Dairies* and *Pullman Company* cases cited above, the parties should be remitted to the State tribunals.

The question may be suggested for the first time on application for *certiorari*.

II.

The decision in this case is in diametrical conflict with the decision of the Court of Appeals for the Fifth Circuit in Schwegmann Brothers Giant Super Markets vs. Hoffman-La Roche, Inc., ...F. 2d ....., not yet officially reported.

We have already set forth so much of the text of the restraining order in the instant case as contains the inhi-

bition intended to be expressed by the trial court. For the immediate convenience of the Court we repeat that text at this point:

> "Defendants herein, their agents, servants, employees, successors and assigns, and each and every one of them be, and they are hereby jointly and severally enjoined and restrained from wilfully and knowingly advertising, offering for sale or selling Seagram products, including but not limited to Seagram's V.O., Seagram's Seven Crown Blended Whiskey and Seagram's Ancient Bottle Gin, in Illinois, at less than the prices stipulated by Seagram-Distillers Corporation from time to time under the Illinois Fair Trade Act and in accordance with contracts made pursuant to said Act, which contracts at the time of the filing of the complaint herein were, now are or may hereafter be in force in Illinois relating to the sale or resale of any of said Seagram products in that state." (Tr. 35.)

Although petitioners challenged this order as violative of Rule 65 (d) of the Federal Rules of Civil Procedure, (U.S.C.A. Title 28, Rule 65(d)) the Court of Appeals affirmed without discussing the point.

In *Schwegmann Brothers Giant Super Market* v. *Hoffman-La Roche, Inc.*, ... F. 2d, (not yet officially reported), Appendix V, *post*, decided April 22, 1955, eighteen days after the decision in the instant case, the Court of Appeals for the Fifth Circuit reached a precisely contrary conclusion in a Fair Trade injunction case.

In that case the injunction restrained the sale of drugs bearing the plaintiff's brand "at prices less than those entered into by plaintiff with other retailers pursuant to the Louisiana Fair Trade Law, or at prices less than those that might be shown in any future minimum-retail-price schedules issued by plaintiff in connection with such contracts." Defendants, having disobeyed the injunction, were cited for contempt. Although the district court had

itself issued the order in question, it concluded that the order was *void* because obedience to it required recurrence to the text of documents other than the order itself and refused to punish the defendants for their disobedience of the order. The district court did, however, amend its order so as to include specification in the order itself of the pertinent minimum prices.

The Court of Appeals *affirmed* and said:

> "The amendment of the decree of injunction was proper, under Rule 65 of the Federal Rules of Civil Procedure, because *an injunction must describe specifically and in reasonable detail, not by reference to the complaint or some other document, the act or acts sought to be restrained.*" (Emphasis supplied.)

The Court of Appeals upheld the order purging the Louisiana defendant of contempt *solely* because the injunction did not set forth the minimum prices which it was intended to enforce.

It thus appears that unless this Court resolves the conflict now existing between the Seventh Circuit decision in the instant case and the Fifth Circuit decision in the *Schwegmann* case, there will be one rule in the Seventh Circuit, another rule in the Fifth Circuit and no articulate rule in the other circuits upon the question:

> NEED A FEDERAL INJUNCTION UNDER A STATE FAIR TRADE ACT SPECIFY THE MINIMUM PRICES BELOW WHICH THE DEFENDANTS MAY NOT SELL TRADE-MARKED COMMODITIES?

The question is one of vast moment. It affects every industry in which commodities are subject to State Fair Trade statutes.

It is respectfully submitted that this question is of sufficient moment to elicit *certiorari*.

III.

This case presents the important question whether the jurisdictional amount in Fair Trade cases is established by evidence of large investments and opinion testimony of loss of large markets if prices are cut without evidence that lower prices will open markets as large as or larger than the hypothetical lost markets.

As is reflected by the opinion of the Court of Appeals, there was evidence in this case that the plaintiff had expended three million dollars "for advertising, as well as for promotion" (Tr. 86), which evidence was offered in purported establishment of *respondent's* "goodwill" in the brand names which it seeks to protect by these proceedings. And there was *opinion* evidence that "the goodwill of the trade mark is absolutely almost lost as the result of a price break" (Tr. 101).

But, in the first place, *the brand names involved do not belong to the plaintiff.*

And the plaintiff's investment in good will is not *per se,* nor does it establish the measure of damages in the unfair trade or unfair competition case.

In *Kvos, Inc.,* v. *Associated Press,* 299 U.S. 269, this Court held that proof of tremendous investment in the goodwill of the Associated Press did not establish the requisite jurisdictional amount of $3,000 where it did not appear that Associated Press, as distinct from its subscriber customers, who were not parties to the suit, would lose anything as a result of defendant's alleged piracy by unauthorized broadcast of news that Associated Press had gathered at expense of vast sums of money.

In *Sunbeam Corp.* v. *Civil Service Employees Association*, 187 F. 2d 768, the Court of Appeals of the Third Circuit held that loss by the *customers* from alleged unfair competition were no measure of the *principal's* losses.

To be sure, there was opinion evidence that respondent would lose many customers if minimum "fair trade" prices were not maintained. There was, however, no evidence whatever that those losses would not be more than compensated for by gains from new customers, including petitioners, if lower prices generally were permissible in an open competitive market.

It is therefore submitted that this case propounds a question of vast importance in the field of fair trade actions and unfair competition as to the measure of the jurisdictional amount in cases such as this one.

Prayer For This Court's Writ of Certiorari.

For reasons apparent upon the record and stated in this petition, petitioners respectfully pray that this Court issue its writ of *certiorari* to review and reverse the judgment of the Court of Appeals in this case.

Respectfully submitted,

William C. Wines,
Allen H. Schultz,
Louis L. Biro,
33 N. LaSalle Street
Suite 1416
Chicago 2, Illinois
Counsel for Petitioners.

Certificate and Proof of Service.

William C. Wines hereby certifies that he has caused service of this Petition to be made upon opposing counsel by the sending of three printed copies of the Petition for *Certiorari* and one printed copy of the Transcript of Record in the Court of Appeals to counsel of record for respondent at their addresses as shown of record in that court.

WILLIAM C. WINES,
A Member of the Bar
of this Court.

APPENDIX

APPENDIX 1.
THE OPINION OF THE COURT OF APPEALS IN THIS CASE.

Before MAJOR, FINNEGAN and SCHNACKENBERG, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* From an order for a preliminary injunction, granted by the district court, on plaintiff's motion, defendants have appealed.

The verified complaint, as amended, alleges that plaintiff, a Delaware corporation, is engaged throughout the United States in the business of dealing in, selling and distributing alcoholic beverages of standard quality. These beverages, described generally as "Seagram products" and including Seagram's "VO" and "7 Crown," are sold in bottles bearing the trade-marks, brands or names of the producers. Plaintiff is the sole person authorized to sell and distribute Seagram products in Illinois.

It is alleged that during the past several years plaintiff has expended over $500,000 in Illinois alone in advertising Seagram products and, as a consequence, the trade-marks brands or names under which Seagram products are sold have become widely and favorably known to the trade and public in Illinois. Plaintiff also alleges that the matter in controversy exceeds $3,000.

Plaintiff's complaint further alleges that the sales of Seagram products in Illinois are subject to the provisions of fair trade contracts executed in accordance with the Illinois fair trade act[1]. Furthermore, it is alleged that, prior to the acts complained of, the defendants had received copies of the plaintiff's schedule of fair trade prices stipulated in accordance with the executed fair trade contracts, and also that defendants have refused to discontinue offering for sale or selling Seagram products at less than the aforesaid stipulated prices, and have continued said

[1] Ill. Rev. Stat., c. 121½, §§ 188—191 (1953).

wrongful conduct by wilfully and knowingly offering for sale and selling said products at prices below those stipulated, and particularly that they advertised in a newspaper on June 15, 1954, that they would sell Seagram products at less than fair trade prices therefor. Plaintiff further alleges that defendants intend to continue said conduct to the irreparable damage of the good will and business of the plaintiff, thereby impairing the value of the trademarks, brands and names under which Seagram products are sold, and unless defendants are immediately enjoined and restrained from continuing such conduct, plaintiff will suffer further irreparable damage.

There was a prayer for a preliminary injunction restraining defendants from advertising, offering for sale or selling Seagram products at less than the stipulated prices, and for a final decree to the same effect.

Defendants' verified answer denied all of the material allegations of the plaintiff, including the allegations that the matter in controversy, exclusive of interest and costs, exceeded the sum or value of $3,000, that plaintiff had no adequate remedy at law, that fair trade contracts had been executed in accordance with the Illinois fair trade act, and that defendants had violated the provisions of said alleged contracts. The answer also stated (1) that plaintiff had abandoned and waived any and all rights it may have had as a result of the execution of alleged price-fixing contracts; (2) that the alleged price-fixing contracts do not comply with the provisions of the Illinois fair trade act in that they lack the immediate vendor-vendee relationship required to bring a price-fixing contract within the exceptions provided under the provisions of said act; and (3) that the Illinois fair trade act is unconstitutional and consequently plaintiff's alleged price-fixing contracts executed thereunder are illegal and void.

The court held a hearing on plaintiff's motion for a preliminary injunction, at which time evidence was taken.

At this hearing vice president Teece of plaintiff, and vice president Lind of plaintiff and Joseph E. Seagram & Sons, Inc., of which plaintiff is a wholly owned subsidiary, testified that plaintiff has adopted a fair trade policy in every state having a fair trade act, and that over five thousand fair trade contracts identical to that introduced into evidence as plaintiff's exhibit 2 had been executed in Illinois. It was stated that the purpose of these contracts was to protect the trade-marks and good will built up over a period of years by the plaintiff for Seagram products. During the last two or three years plaintiff has in fact spent over $3,000,000 in advertising and promoting their sale in Illinois. In addition, plaintiff has 32 "missionary men," who continuously contact retailers with reference to the plaintiff's products. They operate primarily in the city of Chicago, and are charged with the duty of determining whether the retailers they call on are maintaining plaintiff's fair trade prices. Plaintiff also employs, from time to time, various shopping services to ascertain whether fair trade prices are being maintained.

Both Lind and Teece testified that unless the price cutting of plaintiff's products by the defendants was restrained, plaintiff's business would suffer grave and irreparable harm; that the good will built up over a period of years would be almost lost, the volume of plaintiff's business would be cut by "at least 50 per cent in three months' time;" that when a brand becomes involved in price-cutting "it loses its standing, and when it has lost its standing, it is through."

On June 15, 1954, an advertisement appeared in the Chicago Sun-Times in which all fifty-two defendant liquor stores offered for sale and advertised fifths of Seagram's "VO" and "7 Crown" at $4.89 and $3.49, although the fair trade prices are $5.98 and $4.30 respectively. This advertisement was published by these defendants individually and collectively as the "Foremost Liquor Stores." The defendant liquor stores are entitled to use the name

"Foremost Store" as subscribers to the merchandising and promotional services rendered by the defendant "Foremost Promotions, Inc."

Teece testified that over fifty liquor retailers in Chicago called on him the day the advertisement was published. One of the callers was the president of the "Illinois Package Association," a group of Chicago liquor retailers. He wanted to know "immediately" what the plaintiff was going to do with reference to the price cutting and added:

> "I have your merchandise on the shelf. If you don't do something about it, I will take it off the shelf."

Teece was also told that other members of this association were of the same opinion. Another complaint registered with Teece was by one of the managers of a chain of Chicago stores. He warned the plaintiff that if something was not done about the advertisement, they proposed to take action.

Also on the day of publication of defendants' advertisement, plaintiff's Chicago manager responsible for "policing the market" in Cook County reported to Teece that there had been a tremendous number of telephone complaints from retail liquor dealers in Chicago. He said that two supervisors had been called in to help handle these calls, and orders had been cancelled because of the defendants' advertisement.

Six weeks before the publication of defendants' advertisement, plaintiff and the attorneys for defendants had entered into an arrangement in connection with the continuance of a fair trade suit involving two "Foremost Stores." A letter reflecting this arrangement was sent by one of the attorneys for defendants to all of them; it was signed by Irving Robins, their "agent and attorney in fact." This letter, dated April 30, 1954, began as follows:

> "As you know, Seagram Distillers Corporation has consistently endeavored to enforce its Fair Trade prices in this area."

The letter then set out the terms of the agreement between the plaintiff and defendants, the substance of which was:

"(1) All Foremost Stores will strictly adhere to the Fair Trade Prices on Seagram products.

(2) Seagram will make every diligent effort to enforce its Fair Trade prices in the Chicago area."

It was also stated that the Foremost Stores would:

"* * * endeavor to keep Seagram informed of all violations (price cutting by competitors of Foremost Stores) so that they (Seagram) may have an opportunity to carry out their Fair Trade policy."

In closing, the letter said:

"We believe that in view of Seagram's consistent record in this matter, it should first be given a reasonable chance to correct any price cutting situation."

Finally, the letter said that if, after notice of a price cutting situation, Seagram should fail to take "proper action we will notify you (defendant stores) and advise you whether you may legally sell Seagram products below the applicable Fair Trade prices."

On May 24, 1954, one of the attorneys for the defendants sent a letter to one of the attorneys for plaintiff which stated that shopping by defendants' agents of what was later shown to be approximately 94 liquor retailers had revealed 76 violations of plaintiff's fair trade prices. A similar letter was sent to plaintiff on June 17, 1954. This letter was based upon shopping by the same agents of approximately 62 stores and listed 43 violations. At the hearing it was stipulated that the defendants' shoppers would testify that they bought products of the plaintiff as indicated in the letters on May 24 and June 17, 1954, they would have the merchandise with them to prove they made the "buys," and that in most of the stores where they said they made purchases, the prices of the products on the stores' shelves coincided with plaintiff's fair trade prices.

After receipt of these letters, the plaintiff "shopped" each of the stores listed. Whenever such subsequent shop-

ping revealed a second violation, an action was begun. It was plaintiff's practice to require two violations before suit was brought. Where there are two violations, action is begun forthwith. In some actions begun by plaintiff the affidavits supplied by defendant were utilized.

The only witness for the defendants was Irving Robins, president of defendant Foremost Promotions, Inc., and "agent and attorney in fact" for the rest of the defendants. Robins was the person responsible for the advertisement of June 15, 1954. He said it was his "prerogative" and "responsibility" to determine the prices at which the defendant liquor stores would advertise plaintiff's products. Robins also said that the prices at which the plaintiff's products were advertised were based upon the price levels reported by defendants' shoppers.

Upon consideration of the pleadings and the evidence the court below made extensive findings of fact, among which were the following:

"7. Unless enjoined, defendants intend to continue said conduct complained of, to the irreparable damage of the good will and business of the plaintiff herein and of the producers of said Seagram products, thereby impairing the value of the trade-marks, brands and names under which Seagram products are sold.

8. Such wrongful conduct of defendants if not enjoined will cause others dealing in Seagram products to fail to comply with the aforesaid Fair Trade contracts, will substantially decrease the volume of sales of Seagram products in Illinois, and will substantially impair the good will of the plaintiff and the good will of the trade-marks, brands and names of the producers of Seagram products, all to the great damage and financial loss of the plaintiff.

10. Plaintiff is and has been vigorous, fair and diligent in the enforcement and maintenance of its Fair Trade prices in Illinois by all appropriate methods, including many legal proceedings.

11. The evidence does not support defendants' asserted claim of abandonment by plaintiff of its Fair Trade program in Illinois or defendants' claim that plaintiff has unreasonably failed and refused to take appropriate action against retail dealers alleged to have been selling Seagram products at prices below those stipulated by plaintiff in accordance with its Fair Trade contracts.

12. The irreparable injury to the good will and business of plaintiff which would be suffered by it if defendants are not enjoined from advertising, offering for sale and selling Seagram products at less than the Fair Trade prices stipulated therefor, during the period prior to final adjudication herein, would be substantially greater than any loss or damages which could then be suffered by defendants as the result of the issuance of an injunction.

13. A preliminary injunction is necessary to preserve the *status quo* now existing until the final determination of the controversy herein."

Among the conclusions of law were the following:

"6. Plaintiff has no adequate remedy at law.

7. The action and threatened action of the defendants in advertising, offering for sale and selling Seagram products at less than the prices stipulated therefor pursuant to said Fair Trade contracts will result in direct, immediate and irreparable injury to plaintiff, and it is therefore entitled to equitable relief.

8. There is a reasonable probability that plaintiff will prevail upon the final determination of the controversy herein.

9. The balance of convenience or injury is resolved in favor of plaintiff and a preliminary injunction is necessary to prevent irreparable injury to it."

It was also ordered that the bond in the amount of $5,000 previously filed by plaintiff pursuant to an earlier temporary restraining order would stand as a penal bond for the payment of damages to any party found to have been wrongfully restrained or enjoined.

1. The findings of fact by the district court are sufficient to embrace all of the material allegations of the amended complaint. Supported by the evidence, they include findings of federal jurisdiction, probability of irreparable damage to plaintiff, and nonabandonment by plaintiff of its price-fixing contracts.

2. While considerable evidence was received by the district court, a final hearing upon the issues did not take place. The evidence was received so that the court might have an opportunity to exercise its discretion upon the motion for temporary injunction. Its granting of such relief must be affirmed unless there has been an abuse of discretion. *Doeskin Products* v. *United Paper Co.*, 195 F. 2d 356, 360. We are not permitted to substitute our opinion for the finding of the district court, where, as here, the record furnishes a reasonable basis for its findings and action. The purpose of a preliminary injunction is to preserve the subject matter of the controversy in its then existing condition—to preserve the *status quo*. *Doeskin Products* v. *United Paper Co.*, *supra*, at 358.

3. The district court should not, on a motion for preliminary injunction, decide as to the constitutionality of a statute. That must be reserved until the final hearing on the merits of the case. The injection of a question as to the alleged unconstitutionality of the Illinois fair trade act by the defendants did not require the district court to pass upon that question in connection with the granting of the preliminary injunction. Neither did the inclusion of that point in the briefs of both parties in this court, give us any right in this appeal from an interlocutory order, to decide that question. As was said in *Mayo* v. *Canning Co.*, 309 U. S. 310, 316:

> "We think the court committed serious error in thus dealing with the case upon motion for temporary injunction. The question before it was not whether the act was constitutional or unconstitutional; was not whether the Commission had complied with the requirements of the act, if valid, but was whether the showing made raised serious questions, under the

federal Constitution and the state law, and disclosed that enforcement of the act, pending final hearing, would inflict irreparable damages upon the complainants."

We do not believe that the record before us shows that any serious question under the federal constitution exists and that therefore enforcement of the act, pending final hearing, would inflict irreparable damages upon the defendants. *General Electric Co.* v. *Masters, Inc.*, 307 N.Y. 229, 120 N.E. 2d 802 (appeal dismissed, 348 U.S. 892, 75 Sup. Ct. 88, Dec. 6, 1954).

4. The preliminary injunction order entered by the district court reads, in part, as follows:

> "It Is Further Ordered, Adjudged and Decreed that * * * defendants herein, their agents, servants, employees, attorneys, successors and assigns, and each and every one of them be, and they are hereby jointly and severally enjoined and restrained from wilfully and knowingly advertising, offering for sale or selling Seagram products, including but not limited to Seagram's V.O., Seagram's Seven Crown Blended Whiskey and Seagram's Ancient Bottle Gin, in Illinois, at less than the prices stipulated by Seagram-Distillers Corporation from time to time under the Illinois Fair Trade Act and in accordance with contracts made pursuant to said Act, which contracts at the time of the filing of the complaint herein were, now are or may hereafter be in force in Illinois relating to the sale or resale of any of said Seagram products in that state."

Defendants contend that the "acts sought to be restrained" are set forth in the order by reference to an "other document," and therefore the order violates rule 65(d) of the Federal Rules of Civil Procedure[2], which reads, in part, as follows:

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[2] 28 U. S. C. A., Rule 65(d).

"(d) Form and scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; * * *"

The obvious purpose of this rule was to enable one reading the order for a temporary injunction, or the temporary injunction itself, to know what act or acts were to be restrained, without being thereby referred to a complaint or other document for that information. This order accomplishes that purpose. Its language is flexible enough to accommodate it to the fact that the prices referred to would in all likelihood vary from time to time in an active market. Hence, we hold that the form of the order[3] does not violate rule 65(d).

For the reasons above stated, the order from which defendants appeal is

AFFIRMED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

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[3] (which was not objected to in the district court by defendants)

APPENDIX 2.
THE ORDER OF THE DISTRICT COURT APPEALED FROM IN THE CASE.

IN THE UNITED STATES DISTRICT COURT
* * (Caption—No. 54 C 832) * *

ORDER.

This cause coming on to be heard on motion of Seagram-Distillers Corporation, plaintiff herein, for a preliminary injunction, upon plaintiff's verified amended complaint, the verified answer of defendants and the affidavit of Edward M. O'Brien filed herein in support of plaintiff's motion for a preliminary restraining order, and upon the evidence introduced by the parties in open Court, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT.

1. Defendants are engaged in the business of selling alcoholic beverages at retail at various locations in Chicago, Illinois, except for the defendant Foremost Promotions, Inc., an Illinois corporation, engaged in the business of promoting the sale of alcoholic beverages sold at retail by the other defendants at their various stores and in preparing and causing to be published advertisements for the sale of such alcoholic beverages on behalf of said defendants, among which advertisements was the advertisement in the June 15, 1954 edition of the Chicago Sun-Times complained of herein.

2. Plaintiff is and has been engaged in the State of Illinois for more than fifteen years in the business of dealing in, selling and distributing alcoholic beverages of standard quality produced by Joseph E. Seagram & Sons, Ltd., Joseph E. Seagram & Sons, Inc., and corporations affiliated with said corporations. Plaintiff is the sole person authorized by said producers to sell and distribute Seagram products in Illinois and sells the same to licensed distributors only. Said beverages, hereinafter referred to as Seagram products, include Seagram's V. O., Seagram's Seven Crown Blended Whiskey and Seagram's Ancient Bottle Gin, are sold in various sized bottles bearing the trade-marks, brands and names of the producers thereof, and are and

have been in free, fair and open competition with commodities of the same general class, produced by others, and sold and distributed in Illinois. It has in the past three years expended approximately $3,000,000 in advertising and promoting the sale of Seagram products in Illinois and the trade-marks, brands and names under which Seagram products are sold have become widely and favorably known to the trade and public generally in Illinois.

3. The matter in controversy herein, exclusive of interest and costs, exceeds the sum of $3,000.

4. Plaintiff is a Delaware corporation. The corporate defendants are Illinois corporations and the individual defendants are all citizens and residents of the State of Illinois.

5. Plaintiff long prior to the defendants' acts complained of in the Complaint executed numerous Fair Trade contracts in Illinois in accordance with the Illinois Fair Trade Act, which contracts are now in full force and effect. Sales of Seagram products in Illinois have been subject to the provisions of such contracts which provide that said Seagram products shall not be sold, advertised or offered for sale within Illinois below the prices stipulated by plaintiff in written schedules. Prior to the acts complained of defendants received schedules of the prices stipulated pursuant to such contracts, which prices have been in full force and effect since April 15, 1953.

6. Defendants, notwithstanding the provisions of said Fair Trade contracts and the prices stipulated by plaintiff in accordance therewith, and notwithstanding plaintiff's insistence that said defendants comply therewith, did on or about June 15, 1954, wilfully and knowingly advertise, offer for sale or sell Seagram products at prices below those stipulated therefor.

7. Unless enjoined, defendants intend to continue said conduct complained of, to the irreparable damage of the good will and business of the plaintiff herein and of the producers of said Seagram products, thereby impairing the value of the trade-marks, brands and names under which Seagram products are sold.

8. Such wrongful conduct of defendants if not enjoined will cause others dealing in Seagram products to fail to comply with the aforesaid Fair Trade contracts, will substantially decrease the volume of sales of Seagram products in Illinois, and will substantially impair the good will of the plaintiff and the good will of the trade-marks, brands and names of the producers of Seagram products, all to the great damage and financial loss of the plaintiff.

9. None of the matters complained of involves sales made by any officer acting under the order of any court, or sales for the purpose of closing out said defendants' stocks of Seagram products, or sales of products damaged or deteriorated in quality.

10. Plaintiff is and has been vigorous, fair and diligent in the enforcement and maintenance of its Fair Trade prices in Illinois by all appropriate methods, including many legal proceedings.

11. The evidence does not support defendants' asserted claim of abandonment by plaintiff of its Fair Trade program in Illinois or defendants' claim that plaintiff has unreasonably failed and refused to take appropriate action against retail dealers alleged to have been selling Seagram products at prices below those stipulated by plaintiff in accordance with its Fair Trade contracts.

12. The irreparable injury to the good will and business of plaintiff which would be suffered by it if defendants are not enjoined from advertising, offering for sale and selling Seagram products at less than the Fair Trade prices stipulated therefor, during the period prior to final adjudication herein, would be substantially greater than any loss or damage which could then be suffered by defendants as the result of the issuance of an injunction.

13. A preliminary injunction is necessary to preserve the *status quo* now existing until the final determination of the controversy herein.

CONCLUSIONS OF LAW.

1. The Court has jurisdiction of all the parties and of the subject matter of this action.

2. The Illinois Fair Trade Act is valid and constitutional.

3. Plaintiff's Fair Trade contracts entered into with numerous retailers in Illinois are valid and conform to the requirements of the Illinois Fair Trade Act and applicable federal law and Seagram products are sold and distributed by plaintiff in Illinois in accordance with said Fair Trade contracts.

4. The advertising, offering for sale or selling of Seagram products below the Fair Trade prices stipulated therefor is in violation of the Fair Trade contracts entered into by plaintiff and is in direct violation of plaintiff's rights thereunder and under the Illinois Fair Trade Act, and such advertising, offering for sale and selling of Seagram products by defendants should be restrained and enjoined.

5. Plaintiff is and has been reasonably, fairly and diligently enforcing its Fair Trade prices in Illinois by all appropriate means, and has not abandoned or waived its Fair Trade program in Illinois.

6. Plaintiff has no adequate remedy at law.

7. The action and threatened action of the defendants in advertising, offering for sale and selling Seagram products at less than the prices stipulated therefor pursuant to said Fair Trade contracts will result in direct, immediate and irreparable injury to plaintiff, and it is therefore entitled to equitable relief.

8. There is a reasonable probability that plaintiff will prevail upon the final determination of the controversy herein.

9. The balance of convenience or injury is resolved in favor of plaintiff and a preliminary injunction is necessary to prevent irreparable injury to it.

It Is Ordered, Adjudged and Decreed that pursuant to stipulation, David Feltzer and Foremost Promotions, Inc. shall be and they hereby are substituted in the amended complaint for defendants Winifred W. Cash and Foremost Liquor Stores, Inc., respectively, and the appearance and answer filed by certain defendants on June 15, 1954 shall stand as the appearance and answer of said defendants David Feltzer and Foremost Promotions, Inc.

It Is Further Ordered, Adjudged and Decreed that

New Cut Rate Liquors Inc.
B & B Liquors, Inc.
Albert Vaitaitis
Harry Silverman
Jack Lavine and Robert Lavine
David Feltzer
Sam Malkin and Maurice Robin
Henry Newman and Rebecca Newman
James L. Horan
Milton M. Chemers
Nick Pintozzi
Thomas Pape
Frank Pintozzi
Ed's Liquors, Inc.
Diversey Liquors Corporation
Friendly Liquor Mart, Inc.
Octavio Narcisi, Nick Brunetti and Feliz Giannattasio
Glenn Liquor Co. Inc.
Binstein, Inc.
Lena Paterno
Jesse Bergandi and Frank Bergandi
Martin R. O'Connor and Martin F. Conroy
Healie Schwartz and Louis Schwartz
Jack Lavine and Myer L. Fellars
Bill and Rose Ridell
Westown Liquors, Inc.
26th and Kedzie Liquor Co. Inc.
Ontario Pharmacy, Inc.

Leon H. Phillips
McCoy Liquor Stores, Inc.
The Real McCoy, Inc.
Roosevelt Wines & Liquors, Inc.
Morris Rubin
Jack Segal
Stanley Lutz
Soifer & Sons, Inc.
Sun Pay Less Drugs, Inc.
Sun Cut Rate Drugs, Inc.
Sun Self-Serv, Drugs Inc.
Leonard L. Freeman
Betty Malkin
James Castaldo
The Malkin Company, Inc.
Harry Schwarzbach
Lawrence & Western Wines & Liquors, Inc.
Foremost Promotions, Inc.
Sam Rosen
Jack Kanarish
Jack W. Kerschner
Sylvia, Leonard and Leonore Robins

defendants herein, their agents, servants, employees, attorneys, successors and assigns, and each and every one of them be, and they are hereby jointly and severally enjoined and restrained from wilfully and knowingly advertising, offering for sale or selling Seagram products, including but not limited to Seagram's V.O., Seagram's Seven Crown Blended Whiskey and Seagram's Ancient Bottle Gin, in Illinois, at less than the prices stipulated by Seagram-Distillers Corporation from time to time under the Illinois Fair Trade Act and in accordance with contracts made pursuant to said Act, which contracts at the time of the filing of the complaint herein were, now are or may hereafter be in force in Illinois relating to the sale or resale of any of said Seagram products in that state.

It Is Further Ordered that the bond heretofore filed by plaintiff pursuant to the temporary restraining order of this Court shall stand as a penal bond for the payment of

such costs and damages as may be incurred or suffered by any party who shall be found to have been wrongfully enjoined or restrained, and that this preliminary injunction remain in full force and effect until the final hearing of this cause and until further order of this Court.

Enter this 2nd day of July, 1954:

Julius J. Hoffman
Judge

APPENDIX 3.
THE JUDGMENT OF THE COURT OF APPEALS IN THIS CASE.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Monday, April 4, 1955

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the said District Court enjoining Defendants, entered July 2, 1954 in this cause appealed from be, and the same is hereby, AFFIRMED, with costs.

APPENDIX 4.
THE ORDER OF THE COURT OF APPEALS DENYING REHEARING IN THE CASE.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Monday, April 25, 1955

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

APPENDIX 5.

UNITED STATES COURT OF APPEALS
For the Fifth Circuit
No. 15350

April 22, 1955.

Schwegmann Brothers Giant Super Markets, et al., v. *Hoffman-La Roche, Inc.*, ... F. 2d ....., not yet officially *reported.*

Before HUTCHESON, *Chief Judge*, HOLMES, *Circuit Judge*, and DAWKINS, *District Judge.*

HOLMES, *Circuit Judge:* This appeal is here in a double aspect, first, on an appeal from an order denying the petition of Hoffman-LaRoche, Inc., to punish the Schwegmann Brothers for contempt; and, second, on an appeal by Schwegmann Brothers from an order dated June 23, 1954, amending a prior injunction entered by the court against them. This is a slightly different phase of the controversy that has been existing between Schwegmann Brothers and the Fair Trade Laws. This case comes up in a way about to be stated, and, since both sides have appealed, Hoffmann-La Roche, Inc., will be referred to as the plaintiff and Schwegmann Brothers Giant Super Markets, *et al.*, will be referred to as the defendants.

In a suit brought by the plaintiff to prevent the defendants from selling the plaintiff's drug products at less than fixed prices, a judgment was rendered for the plaintiff which permanently restrained the defendants from in any manner or by any means, directly or indirectly, advertising for sale, or selling, any of certain named commodities manufactured by and bearing the trade-mark, brand, or name of plaintiff, at prices less than those stipulated in contracts entered into by plaintiff with other retailers pursuant to the Louisiana Fair Trade Law, or at prices less than those that might be shown in any future minimum-retail-price schedules issued by plaintiff in connection with such contracts.

Jurisdiction of this cause was retained for the purpose of giving full effect to said judgment and for the purpose of making such further orders and decrees, or taking such further action, if any, as might become necessary or appropriate to carry out and enforce said judgment.

After a fair hearing on the petition to punish the defendants for contempt, the court below denied the petition and amended its former judgment so as to state the permissible minimum prices therein. We find no reversible error in the rulings of the trial court because, among other reasons, the customer's awareness of the name of the drug in his prescription is not an essential factor in determining whether the trade name or good will of the manufacturer is used if the prescription designates the drug by the manufacturer's name or trade-mark. The amendment of the decree of injunction was proper, under Rule 65 of the Federal Rules of Civil Procedure, because an injunction must describe specifically and in reasonable detail, not by reference to the complaint or some other document, the act or acts sought to be restrained. *Nasif* v. *United States,* 165 F. (2) 119.

What we are doing may be contrary to the sense of justice of the writer, who retains the views expressed by him in his dissent in *Schwegmann Brothers* v. *Eli Lilly & Co.,* 205 F. (2) 788; and other members of the court may not like the so-called fair-trade laws and think it wrong for them to exist; but the Supreme Court denied certiorari in the just-cited case, which denial was not a decision on the merits, but it left this court's decision as the law of the Fifth Circuit until overruled by this court *en banc* or by the Supreme Court on certiorari in a subsequent case. This is not true in Texas, however, because the legislature of that state has enacted no similar so-called fair-trade law. It is not a federal law but a Louisiana statute that controls our decision in this case. The federal statute simply exempts the Louisiana statute from the restrictions of the federal anti-trust statutes. Our jurisdiction in this case as a federal court depends wholly upon diversity of citizenship between the parties and the requisite amount. If this were a resident corporate plaintiff instead of a nonresident corporation, this suit might have to be brought in

a state court of Louisiana. The applicable federal statute is the one that exempts the parties to this price-fixing contract from the prohibitions of the federal anti-trust statutes. See the Act of July 14, 1952, 66 Stat. 631, 632, 15 U.S.C. 45, known as the McGuire Act. The primary purpose of the latter act was to change as to future cases the result reached by the Supreme Court in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 71 S. Ct. 745, 95 L. Ed. 1035.

A *sine-qua-non* of the constitutionality of the Louisiana Fair Trade Law is the right of a non-signer to remove the trade-mark of the manufacturer and sell the commodity at his own price. This was specifically held in the *Old Dearborn* case, 299 U.S. 183, 195, but there was a proviso to that concession, which was: "Provided he can do so without using the good will of the latter as an aid to that end"; and he cannot do that when a customer comes in with a prescription that designates a trade-marked product. The customer thereby impliedly adopts the prescription whether he knows what is in it or not. Only the Congress, the Supreme Court, or the several state legislatures, can grant relief from this anomalous situation, which makes possible vertical monopolistic price-fixing, even for vaccines against polio, by exempting dealers and manufacturers alike from the pains and penalties of the federal anti-trust act. 66 Stat. 631, 15 U.S.C. 45.

The judgment appealed from is AFFIRMED on both appeals.

FILED
JUL 9 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 137

NEW CUT RATE LIQUORS, INC., et al.,
Petitioners,

vs.

SEAGRAM DISTILLERS CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION.

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IN THE

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OCTOBER TERM, 1955.

No. 137.

NEW CUT RATE LIQUORS, INC., et al.,
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SEAGRAM DISTILLERS CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Court of Appeals is reported in 221 F. 2d 815. The District Court rendered no opinion. The District Court's findings and conclusions and the opinion of the Court of Appeals are reprinted in the Appendix to the petition for certiorari (Pet. App. 22, 32).

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

STATUTES INVOLVED.

The Illinois Fair Trade Act is adequately set forth in the petition, pp. 4-6. The applicable federal statute, the McGuire Act, 66 Stat. 632, 15 U. S. C. § 45, as amended July 14, 1952, is set forth in Appendix A, *infra*, pp. 13-14. Rule 65(d) of the Federal Rules of Civil Procedure is quoted on p. 9, *infra*.

QUESTIONS PRESENTED.

The Court of Appeals upheld the granting of a preliminary injunction as within the discretion of the trial court. The questions which petitioners seek to have this Court decide are:

1. Whether the lower courts should, without any request for such action by the petitioners, have remitted the case to the Illinois courts because of the presence of questions of state law, which are insubstantial and upon which there is controlling Illinois law.

2. Does the preliminary injunction violate Rule 65(d) of the Federal Rules of Civil Procedure because it prohibits willful and knowing departures from the prices stipulated in present and future Fair Trade contracts without directly incorporating such prices in the injunction order?

3. Did the record adequately disclose that the jurisdictional amount was involved?

STATEMENT OF THE CASE.

Plaintiff-respondent, a Delaware corporation, as the sole person authorized to sell and distribute Seagram alcoholic beverages in Illinois, sued to enjoin petitioners who are Chicago liquor retailers, from advertising or selling Seagram products at less than the prices stipulated by plaintiff, pursuant to its Fair Trade contracts with retail-

ers in Illinois. Defendants had, in a cooperative advertisement published June 15, 1954 in a Chicago daily newspaper, offered to sell certain Seagram products at their 52 stores at prices below those stipulated by plaintiff (R. 46).

Plaintiff moved for a preliminary injunction, and such an injunction was granted by the District Court after a hearing and the taking of testimony (R. 35). No objection was urged by defendants as to the form of the order.

The evidence showed that plaintiff had executed over 5,000 Fair Trade contracts in Illinois after the adoption of the McGuire Act (15 U. S. C. § 45, as amended July 14, 1952) (R. 98), and that in the two or three years prior to the hearing it had spent over $3,000,000 in advertising and promoting the sale of Seagram products in Illinois (R. 31, 87) and had made extensive efforts by filing injunction actions and otherwise to enforce its Fair Trade contracts in Illinois (R. 32, 77, 99, 106). Plaintiff's witnesses testified that a number of retailers dealing in Seagram products complained about defendants' advertisements and threatened to discontinue handling Seagram products (R. 80-82) and that unless price-cutting by defendants were enjoined its business would suffer great and irreparable harm, its goodwill would suffer (R. 32, 84, 104) and its volume of business would substantially decline (R. 80, 101).

The District Court found that the controversy involved over $3,000 (R. 31, Pet. App. 33) and that plaintiff would be irreparably injured if a preliminary injunction were not granted (R. 32, Pet. App. 34). The court rejected defendants' contention that plaintiff had failed properly to enforce its Fair Trade prices and had abandoned its Fair Trade program in Illinois (R. 32, Pet. App. 34). The court also concluded that the Illinois Fair Trade Act is constitutional and valid (R. 33, Pet. App. 35).

On appeal, the Court of Appeals affirmed, holding that there was no abuse of discretion by the District Court in

granting a preliminary injunction (Pet. App. 29). The court stated that the District Court was not required to pass on the alleged unconstitutionality of the Illinois Fair Trade Act in granting the preliminary injunction (Pet. App. 29). The Court further held that the form of the order did not violate the requirements of Rule 65(d) of the Federal Rules of Civil Procedure (Pet. App. 30-1). A petition for rehearing confined to the issue as to the existence of the required jurisdictional amount was denied (Pet. App. 38).

In neither court did petitioners suggest or ask that there be remitted to the state courts the issues as to the constitutionality of the Illinois Fair Trade Act or as to the applicability of the Illinois Act to plaintiff's Fair Trade contracts.

REASONS FOR NOT GRANTING WRIT.

1. This is not an appropriate case for certiorari, even apart from the lack of merit in any of petitioners' contentions. All that the Court of Appeals did here was to affirm a preliminary injunction, without going into the merits of the case, on the ground that the trial court had not abused its discretion (Pet. App. 29). That also would be the issue here, if certiorari were granted. *Alabama* v. *United States,* 279 U. S. 229; *Wilshire Oil Company* v. *United States,* 295 U. S. 100. Except in unusual circumstances, none of which are present here, certiorari will not be granted to review such an interlocutory order. *Hamilton-Brown Shoe Company* v. *Wolf Bros.,* 240 U. S. 251, 258.

There is a special reason why this principle should be applied here, for the main point sought to be presented here (petitioners' Point I) was never presented to the lower courts, the second point (petitioners' point II) was not urged in the District Court, and the third point was not

presented to either court in the form in which it is now stated. Petitioners will have ample opportunity to raise each of those questions in the District Court when the case comes up for final hearing.

2. Petitioners here urge for the first time that because questions of state law are presented, the lower courts erred in not remitting the parties to the Illinois courts. But the Court of Appeals did not decide any question of state law. It was not required to do so on an appeal from an order issuing a preliminary injunction. Furthermore, as we will show, the Illinois Appellate Court has recently upheld the application of the Illinois Fair Trade Act in an identical situation. *Sunbeam Corp.* v. *Central Housekeeping Mart*, 2 Ill. App. 2d 543, 120 N. E. 2d 362 (1954).

In any event, there is no general rule that federal courts in diversity cases can not decide questions of state law, and this Court has never held that all diversity cases in which such questions are presented must be remitted to state courts. Any such broad ruling would destroy the diversity jurisdiction. The cases on which petitioners rely—*Railroad Commission* v. *Pullman Co.*, 312 U. S. 496, and *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168—involved troublesome federal constitutional issues which could be obviated by an authoritative determination of state questions which were also of substance and, in the *Fieldcrest* case, of considerable complexity. Here there is no federal constitutional question to be avoided and no difficult or complex question of Illinois law.

(a) The first question of state law which petitioners seek to raise is whether the Illinois Fair Trade Act applies to interstate transactions without having been re-enacted after the McGuire Act removed the obstacle to enforcement created by the Sherman Act.[1] The same argument

1. Some courts have treated this question as if it were governed by federal law. *In re Rahrer*, 140 U. S. 545, 564-565; *West Virginia*

was presented to and rejected by the Illinois Appellate Court in *Sunbeam Corp.* v. *Central Housekeeping Mart, supra.* Although the point is not specifically mentioned in the court's opinion, it was argued in the appellants' reply brief in that case, pp. 6-8 (quoted in the Appendix hereto, *infra,* p. 15), and the court's statement that "under the McGuire Act plaintiff's cause of action is maintainable" disposes of it (2 Ill. App. 2d at 552, 120 N. E. 2d at 367).

The principles governing this type of situation, are well stated in 1 Sutherland, *Statutory Construction* (3rd Ed. Horack, 1943), Sec. 2027, p. 501, as follows:

> "Where a state statute is declared unconstitutional or invalid because it is in conflict with federal legislation, the state statute is in effect merely unenforceable or suspended by the existence of the federal legislation. Consequently, the repeal of the federal statute reinstates or revives the state law without an express re-enactment by the state legislature. But where a state statute conflicts with a federal enactment and also is violative of the state or federal constitutions, the repeal or removal of the federal enactment does not revive the state statute."

Cases holding that re-enactment is unnecessary when a conflicting federal statute is superseded include *In re Rahrer,* 140 U. S. 545; *Central Pacific R. Co.* v. *Nevada,* 162 U. S. 512; *Tua* v. *Carriere,* 117 U. S. 201; *State* v. *Adams Express Co.,* 219 Fed. 794 (C. C. A. 4); *Starace* v. *Rossi,* 69 Vt. 363, 37 Atl. 1109 (1897); *Blair* v. *Ostrander,* 109 Ia. 204, 80 N. W. 330 (1899); *State* v. *United States Express Co.,* 164 Ia. 112, 145 N. W. 451 (1914); *State ex rel. Bartlett* v. *Fraser,* 1 N. D. 425, 48 N. W. 343 (1891).

This well-settled rule was applied in recent Fair Trade

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v. *Adams Express Company,* 219 Fed. 794, 800 (C. C. A. 4); *General Electric Co.* v. *Masters, Inc.,* 307 N. Y. 229, 120 N. E. 2d 802, 806, appeal dismissed 348 U. S. 892.

decisions rejecting a contention such as is made here by petitioners, *General Electric Company* v. *Packard Bamberger & Co.*, 14 N. J. 209, 102 A. 2d 18, 23 (1953); *General Electric Company* v. *Masters, Inc.*, 307 N. Y. 229, 120 N. E. 2d 802, 806 (1954), appeal dismissed 348 U. S. 892.

The constitutionality of the Illinois Fair Trade Act here involved, including the non-signer clause, was sustained both by the Illinois Supreme Court and by this Court in *Old Dearborn Distributing Co.* v. *Seagram-Distillers' Corp.*, 363 Ill. 610 (1936), 299 U. S. 183, involving this very respondent. Under the *Schwegmann* decision[2] that statute would not have been void but inapplicable to interstate transactions. Passage of the McGuire Act enabled the state law to operate without this limitation. Since the law was never void, however, there was no occasion to reenact it.

Petitioners admit that the New York and New Jersey cases cited above support respondent's position, but rely on *Grayson-Robinson Stores* v. *Oneida, Ltd.*, 209 Ga. 613, 75 S. E. 2d 161 (1953), certiorari denied 346 U. S. 823, as showing that there is a sufficiently doubtful question to warrant submission of the problem to the Illinois courts. The Georgia case stands alone. It is not merely contrary to the New York and New Jersey cases, but also to the body of general law referred to at page 6, *supra*. The Georgia case, relying to a considerable extent on statements in *American Jurisprudence*, Vol. 11, p. 833, reflects that work's failure to distinguish between state laws invalid (or partially inapplicable) because of conflict with a superseded federal statute (which was the case here) and those which conflict directly with constitutional provisions (which did not occur here), the distinction noted in the last sentence quoted from Sutherland at p. 6, *supra*. Since the Georgia case has already been called to the

2. *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384.

attention of the Illinois Appellate Court for the very district in which the instant case arose, without avail (see p. 5, *supra*; Appendix, *infra*, p. 15), petitioners' argument that the Georgia case calls for remission to the Illinois courts is entirely without merit.

(b) The other question of Illinois law which petitioners urge as a ground for remission to state courts is equally insubstantial. Petitioners object that the Illinois Act does not cover the Fair Trade contracts in issue (R. 37) on the ground that they were made between respondent and retailers, although respondent sells its products to wholesalers who in turn sell to retailers. This form of contractual arrangement is commonly used. It has been held to be within the Illinois Fair Trade Act in *Sunbeam Corp.* v. *Central Housekeeping Mart*, 2 Ill. App. 543, 120 N. E. 2d 362 (1954), discussed at page 5, *supra*, although the objection here involved was not raised, presumably because the defendant did not think it sufficiently meritorious. The point has been expressly rejected in other states when presented. *General Electric Co.* v. *Masters, Inc.*, 307 N. Y. 229, 120 N. E. 2d 802, 806, appeal dismissed 348 U. S. 892;[3] *General Electric Co.* v. *S. Klein on the Square*, 121 N. Y. S. 2d 37, 45 (Sup. Ct. N. Y. Co., 1953); *Calvert Distillers* v. *Nussbaum*, 2 N. Y. S. 2d 320 (Sup. Ct. N. Y. Co., 1930); *Sunbeam Corp.* v. *MacMillan*, 110 F. Supp. 836, 837, 838 (D. Md., 1953).

The Illinois Fair Trade Act does not require that a Fair Trade contract be incidental to a sale between the parties. It applies to any "contract *relating to* the sale or resale of the commodity." The contracts between respondent

3. The record in the *Masters* case shows that General Electric's method of entering into Fair Trade contracts directly with retailers, but selling to them through wholesalers, is the same as respondent's here. See Findings of Fact of the trial court, as printed in the Jurisdictional Statement in *Masters' Inc.* v. *General Electric Co.*, No. 381, 1954 Term, pages 22-24.

and their retailers, here as in the *General Electric* cases and the *Sunbeam* cases, *supra*, in which the retailers agreed to abide by respondent's price schedules, clearly relate to the "resale of the commodity."

3. The preliminary injunction in this case restrained defendant-petitioners from "wilfully and knowingly advertising, offering for sale or selling Seagram products * * * at less than the prices stipulated by Seagram-Distillers Corporation from time to time under the Illinois Fair Trade Act and in accordance with contracts made pursuant to said Act * * *" (R. 35).

Petitioners argue that this order conflicts with the provision in Rule 65(d) of the Federal Rules of Civil Procedure, that injunctions shall describe the acts sought to be restrained "in reasonable detail, and not by reference to the complaint or other document."[4] This objection was not presented to the District Court (see footnote 3, Opinion, Pet. App. 31), although it was passed on by the Court of Appeals. On final hearing in the District Court there will nevertheless be opportunity to remedy any possibility of a defect in the form of injunction, if that be necessary.

There can be no question that petitioners here were adequately apprised by the injunction as to what they were forbidden from doing—*wilfully* and *knowingly* selling Seagram products at less than the prices stipulated under the Fair Trade contracts. Unless they knew what the

4. Rule 65(d) provides:

"(d) *Form and Scope of Injunction or Restraining Order.* Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

prices were (and respondents make sure that they do by sending them price lists (R. 31, para. 5, Findings), they could not "wilfully and knowingly" violate the decree. The objection is that the prices are not stated in the decree directly but by reference to the price lists, and that this violates Rule 65(d). As a practical matter it would be impossible to incorporate directly in a decree price lists which are subject to change from time to time without asking the court for an amended order every time a price was changed (see, Opinion, Pet. App. 31).

Since there are other methods of making sure that defendants are fully advised of what they are required to do, such as by making the decree apply only to "wilful and knowing" violations or by making it conditional on the plaintiff informing defendants of the prices stipulated and of each price change, there is no reason why Rule 65(d) has to be given the completely unworkable construction advocated by petitioners here. In other contexts it has not been construed as completely forbidding reference to other documents.[5] If petitioners are really concerned as to their inability to discover the respondents' stipulated prices—and since they know the practice in the trade, we suspect that they are not—additional protection can be given them when the case goes back for final hearing.

We submit that it is not possible to tell from the one-sentence treatment of this point in the Fifth Circuit's

5. *Gordon Johnson* v. *Hunt*, 109 F. Supp. 571 (N. D. Ohio), (reference to "defendants' interrogatory exhibits" and "plaintiff's own circulars"); *Fleming* v. *Warshawsky & Co.*, 123 F. 2d 622 (C. A. 7) ("names of employees to be paid not listed"); *Bowles* v. *Montgomery Ward & Co.*, 143 F. 2d 38 (C. A. 7) (reference to the "price schedules now or hereafter issued by the Office of Price Administration"); *Cassidy* v. *Puett Corp.*, 182 F. 2d 604 (C. A. 4). (reference to "the invention claimed in U. S. Patent No. 2,435,729"); *Wilson* v. *Union Tool Co.*, 265 Fed. 669 (C. A. 9), affirmed 259 U. S. 107 (reference to "particular patent").

decision in *Schwegmann Bros.* v. *Hoffman-LaRoche* (Pet. App., p. 40), whether that court disagrees with the above analysis and is in conflict with the views expressed by the Seventh Circuit in this case. The Fifth Circuit stated merely that "the amendment of the decree of injunction" by the District Court "was *proper*" (italics supplied) in view of the provision of Rule 65 against incorporation by reference. Furthermore, it does not appear in that case that the injunction forbade only wilful and knowing violations, as it does here.

In any event the conflict, if such there be, is not of sufficient importance to warrant review of this case by this Court. The Court has in the past not granted certiorari in all cases of conflict, however unimportant. Stern & Gressman, *Supreme Court Practice* (2d Ed., 1954), pp. 111-113. And it is of little moment that injunctive orders may be phrased differently in Fair Trade cases in the Fifth and Seventh Circuits.

4. Petitioners' last point (Petition, pp. 20-21) is that there was no basis for the finding that $3,000 was involved, despite evidence that respondent's good will was worth much more than that and that many customers would be lost (R. 84, 86, 87, 81, 101), because there was no evidence that additional customers might not be gained if prices were lowered. This question is largely factual, not meriting review by this Court. Furthermore, once respondent had introduced evidence showing, as the trial court found (R. 32), that petitioners' price-cutting would substantially decrease the volume of Seagram sales in Illinois, and will substantially impair the good will of the plaintiff and of the trade-marks involved, it was incumbent upon petitioners to introduce evidence leading to a contrary conclusion, if such evidence exists.

Petitioners' argument on this point also overlooks the well settled rule that it is the value of the right sought to be protected which is determinative. *Healy* v. *Ratta*,

292 U. S. 263, 268; *Glenwood Light Co.* v. *Mutual Light Co.*, 239 U. S. 121, 126. And in Fair Trade cases it is uniformly held that the jurisdictional amount is measured by the value of the right to be protected—the good will established for the products in question. Arguments such as those advanced by petitioners here have been uniformly rejected.[6]

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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6. Decisions in the Northern District of Illinois, Eastern Division on this point are: *Calvert Distillers Corp.* v. *Rosen et al.*, 115 F. Supp. 146, 147 (1953, Judge LaBuy); *Frankfort Distillers Corp.* v. *Schwab et al.*, Case No. 53 C 426 (unreported opinion by Judge Sullivan, May 18, 1953); *Seagram Distillers Corp.* v. *Meryl Jacobson, Case* No. 53 C 720 (Judge Igoe, April 7, 1953); *Calvert Distillers Corp.* v. *Deligiannis*, Case No. 53 C 379 (Judge Sullivan, May 18, 1953).

Decisions to the same effect elsewhere are: *General Electric Co.* v. *Sabreen*, 1954 CCH Trade Cases, Par. 67,639, p. 69,046 (E. D. Pa., 1953); *Caron Corporation* v. *Wolf Drug Co.*, 40 F. Supp. 103, 105 (D. N. J. 1941); *Miles Laboratories* v. *Seignious*, 30 F. Supp. 549, 554 (E. D. S. C. 1939); *Dorothy Gray, Ltd.* v. *Johnson Wholesale Perfume Co.*, 45 F. Supp. 744 (D. Conn. 1941); *Calvert Distilling Co.* v. *Brandon*, 24 F. Supp. 857 (W. D. S. C. 1938); *James Heddon's Sons* v. *Callender*, 28 F. Supp. 643, 644, 645 (D. Minn. 1939).

APPENDIX A.

McGuire Act.

Section 5 of Federal Trade Commission Act, as amended, Act of July 14, 1952, Chapter 745, 66 Stat. 632, 15 U S. C. § 45:

(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

(2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that wilfully and knowingly advertising, offering for sale, or selling any commodity at less than

the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938, and persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 227(b) of Title 7, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

APPENDIX B.

EXCERPT FROM APPELLANTS' REPLY BRIEF, pp. 6-8, IN *Sunbeam Corp.* v. *Central Housekeeping Mart*, 2 Ill. App. 2d 543, 120 N. E. 2d 362 (1954):

There is also serious doubt whether, as contended by the plaintiff, that the Illinois Fair Trade Act remains alive and constitutional. The Illinois Fair Trade Act was enacted in 1935. At the time of its enactment there was no Miller-Tydings Act nor McGuire Act, the Miller-Tydings Act having been enacted in 1937 and the McGuire Act in 1952. At the time, therefore, of the passage of the Illinois Fair Trade Act the Legislature lacked authority to enact legislation affecting articles and commodities in interstate commerce since Congress by the enactment of the Sherman Act had left no area of its constitutional power unoccupied. *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 495. Since this appeal has been pending there has been a square holding that a state fair trade act passed prior to the Miller-Tydings Act and the McGuire Act is unconstitutional. This was the holding of the Supreme Court of Georgia in *Grayson-Robinson Stores, Inc.* v. *Oneida, Ltd.*, 75 S. E. (2d) 161, 163. The nub of the decision is that the state legislation offends the supremacy clause as well as the commerce clause of the Constitution. The opinion states:

> "So we accordingly agree that the provisions of Georgia's Fair Trade Act are not prohibited by the Sherman Act as amended by the Miller-Tydings Act and by the McGuire Act; but we do not agree to the contention that Georgia's Fair Trade Act became valid, without re-enactment, after the Sherman Act was thus amended. Since Georgia's Fair Trade Act was contrary to and inconsistent with the terms of the Sherman Act before it was amended by the Miller-Tydings Act

and the McGuire Act, it offended the supremacy clause as well as the commerce clause of the Federal Constitution, and our Constitution of 1945 by Article 1, Section 4, paragraph 1, declares that legislative acts which violate the Constitution of the United States are void and the judiciary shall so declare them. Code, Ann. Supp. § 2-402. The time with reference to which the constitutionality of an act is to be determined is the date of its passage by the enacting body (*Jones* v. *McCaskill,* 112 Ga. 453, 37 S. E. 724); and if it is unconstitutional then, it is forever void. *Christian* v. *Moreland,* 203 Ga. 20 (45 S. E. 2d 201).

> " 'The general rule is that an unconstitutional statute, though having the form and name of law is in reality no law, but is wholly void, and in legal contemplation is as inoperative as if it had never been passed. Such a statute leaves the question that it purports to settle just as it would be had the statute not been enacted.' 11 Am. Jur. (Constitutional Law) 827, § 148."

The Illinois statute, like the Georgia statute, has never been re-enacted. The only change in the Illinois act was an amendment in 1941 creating the only exemption for fair trading concerning the commodities for library purposes offered for sale to the state or its political subdivisions.